1978

Industrial Construction Inc. et al v. State of Utah : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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INDUSTRIAL CONSTRUCTION INC., a Nevada Corporation, and PRITCHETT CONSTRUCTION COMPANY, a Joint Venture,	:	
Plaintiff and Respondent.	:	CASE NO. 15167
vs.	:	
STATE OF UTAH, by and through the DEPARTMENT OF TRANSPORTATION,	:	
Defendant and Appellant.	:	

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BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT OF THE
FIFTH DISTRICT COURT FOR MILLARD COUNTY,
THE HONORABLE J. HARLAN BURNS, JUDGE

- - -ooOoo- - -

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I N D E X

CASES CITED

RULES CITED

TREATIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

This case arises out of the breach by Appellant of a road construction contract dated September 11, 1974.

DISPOSITION IN LOWER COURT

The Trial Court found that Appellant breached the contract on September 26, 1975, by refusing to pay for road materials produced by Respondent which met the acceptance tests specified in the contract, which amounted to an anticipatory breach and terminated the contract. The Court awarded Respondent Judgment in the amount of $1,539,147,05, comprising payment at contract rates for all work performed to the date of the breach, less payments made thereon by Appellant, anticipated profit on the part remaining to be performed, and certain other damages incidental to the breach. The Lower Court also allowed Appellant certain offsets totalling $192,392.46, and awarded Respondent a net Judgment in the amount of $1,346,754.59.

"RELIEF SOUGHT ON APPEAL"

The Respondent by its cross-appeal seeks an Order modifying the Judgment to award Respondent additional sums as damage for rental charges incurred by Respondent, on equipment rented from others.

STATEMENT OF FACTS

On September 11, 1974, the State of Utah, through its State

Road Commission, (now known as the Department of Transportation) entered into a contract with Industrial Construction, Inc.) and Pritchett Construction Co., Inc., (a Joint Venture), for the construction of a certain portion of Interstate 15 from Holden to Scipio. This suit arose out of breaches of that contract committed by the Appellant, Department of Transportation.

Prior to the bid opening, Mr. Lalif Wood, President of Industrial Construction, Inc., noticed that Sheet 55 of the Special Provisions attached to the contract, contained certain requirements relating to a drum-dryer mixer (one type of hot plant utilized to produce asphalt) and that Sheets 56 and 57 of the Special Provisions contained certain provisions relating to aggregate storage commonly referred to as "the split stockpile method". "Aggregate" is a term that refers to the gravel components used to produce asphalt for road surfacing.

Mr. Wood had seen a similar requirement on a job his company had performed in Alamo, Nevada, but his company was not required to split the stockpile because it did not use a drum-dryer mixer. (T. 264.)

Before the bids were submitted, Mr. Wood called Mr. C. V. Anderson, the Utah State Highway engineer and Assistant Director of the Department of Transportation. Mr. Anderson told

Mr. Wood that the split stockpile provision would not pertain to Respondent. (T. 38-41.) Respondent bid the project based on this information. (T. 662.)

However, when the work progressed to the point where the contractor began to build its stockpile, the Resident Engineer (also called the Project Engineer) insisted that the stockpile be split. (See Ex. D-5.) After a series of meetings and correspondence on this subject, the contractor wrote a letter to the Resident Engineer in which it proposed to set up three stockpiles, desribing the contents of each pile. The proposal also stated:

> "The material will be fed into the dryer as required in order to meet the gradation specified.
>
> "Sufficient material for two days production will be stockpiled prior to the start of plant mix operations." (Ex. P-2 Emphasis added.)

The last sentence is a paraphrase of a sentence from Sheet 56. It should also be noted that neither Sheets 56 and 57 nor the contractor's proposal contained any requirement as to where the stockpiles were to be located. (See Ex. D-4, Sheet 56 and Ex. P-2.)

On June 4, 1975, the Resident Engineer responded by letter which stated in part that the contractor's proposal for aggregate storage complied with the contract specifications as bid. (Ex. P-3.)

Thereafter, the contractor constructed the three stockpiles. However, only one was located at the site of the hot plant. The other two were located in a gravel pit approximately 8 miles away at the other end of the project.

At the request of the contractor the Project Engineer sampled all stockpiles and submitted to the contractor, test reports showing the contents of each stockpile. (Ex. P-4.)

On August 21, 1975, the contractor informed the Project Engineer that he intended to install two feeders on the hot plant, and to feed both feeders from the single stockpile. If the material thus produced was not in Specification, whatever was needed from the other two stockpiles would be hauled up and blended in. The Project Engineer replied that that would be agreeable with him. (T. 140.)

On September 18, 1975, the contractor commenced hot plant operations with the knowledge and cooperation of the Project Engineer feeding from only one stockpile. (T. 103-108.) For the first six days the contractor produced asphalt having a value of more than $29,000.00, all of which was in substantial compliance with the Specifications, according to the daily tests conducted by the State. (See Ex. P-12, which are the test reports prepared by the State and submitted daily to the contractor.) As of the sixth day of production, the State had assessed price

reductions agreed to by the contractor in the amount of $977.33. (Ex. P-12.)

The contract documents contain extensive provisions setting out the acceptance standards to be applied to the asphalt product produced, and showing the computations by which the bid price (in this case $3.00 per ton) could be reduced if the material produced deviated from the standards specified in the contract. (See Ex. D-4, pp. 40-50.)

In essence, the Specifications permit a price adjustment only for variations in the gradation and bitumen content and the density of the asphalt produced, and the roughness and smoothness of the final road surface. (Ex. D-4, p. 50.)

On the seventh day of production, (September 26, 1975) the project Engineer hand delivered to the contractor a letter which stated that the contractor would not be paid for the asphalt produced to that date, because the contractor was not complying with the split stockpile method of aggregate storage. (See Ex.P-6.)

The contractor told the Project Engineer that the letter would force the contractor to shut the job down because the contractor couldn't continue to produce this material without being paid for it. (T. 119-120.) At that point, the contractor suspended its operations and wrote the Project Engineer a letter which stated that the State's action was an arbitrary and

capricious decision, which amounted to a breach of the contract. The contractor reiterated that the contractor could not continue to perform under the condition created by the State's action. (Ex. P-7.)

In response, the State reaffirmed its position in another letter and stated that continued performance by the contractor "will be interpreted as acceptance of a suitable price reduction yet to be determined. (See Ex. D-3. Emphasis added..)

At the time the contractor suspended its operation, there was no other work it could perform, (T. 163) since it had reached a stage where the traffic through the construction project prevented any further work. The contractor intended to finish the paving which was then in process and switch the traffic onto it in order to continue the remaining operations. (T. 156-157.) This was frustrated by the letter of September 25, 1975. (T. 120.)

However, the contractor felt that with the onset of the coming winter the construction work accomplished to the date of suspension would create a hazardous condition on the public highway through the project (U. S. 91). (See T. 170-171.)

The contractor called this to the attention of the Department of Transportation, (T. 171-172) and tried repeatedly to come to an understanding on an acceptable solution, but reached an impasse.

Finally, on October 22, 1975, the contractor wrote the Department stating that the contractor felt the greatest consideration should be the safety of the travelling public, and therefore the contractor intended to pave sufficient of the balance of the north bound lane to turn the traffic from the old highway onto the new construction. (Ex. p-9.)

The contractor performed this work beginning on October 27, 1975, and continuing for approximately four days. (T. 177, 179.) After the traffic was switched the Respondent did no further work. The other joint venturer, Pritchett Construction Co., did some additional work in order to protect the work previously accomplished, from damage. (T. 134-136.)

The Trial of this matter was conducted in two parts. From March 25, through April 1, 1976, the Court heard the issues relating only to whether the contract was breached by either party and, if so, whether the breach was anticipatory. On April 20, 1976, the Court ruled that the Appellant had breached the contract by its refusal to pay for Plaintiff's work which was within the acceptable limits of the contract, and further, that the breach was an anticipatory and total breach of the contract. (See Transcript of Hearing, April 20, 1976, p. 2.)

Thereafter, from June 30, intermittently through July 8, 1976, the Court heard the issues relating to damages. At the

conclusion of the Trial, the Court entered Judgment for Respondent in the net amount of $1,346,754.59. The State of Utah appealed and the contractor cross-appealed from the refusal of the Court to allow the full amount of rentals paid by the contractor after the breach on certain essential equipment rented from others.

Unfortunately, the reporter who prepared the transcript of evidence restarted the page numbers of the hearing on the portion of the Trial related to damages with the number "1". In order to clarify the references herein to the pages of the transcript, Respondent will use a system wherein "(T. 100)" refers to page 100 of the transcript on the first phase of the Trial relating to breach of contract, and "(T-Dam.100)" refers to page 100 of the transcript on the second phase of the Trial relating to the damages. "(R. 100)" refers to page 100 of the Record on Appeal.

ARGUMENT

POINT I

THE JUDGMENT OF THE TRIAL COURT SHOULD BE SUSTAINED EXCEPT AS NOTED HEREAFTER IN RESPONDENT'S CROSS-APPEAL.

Appellant, in its Brief, has raised five issues on Appeal. The first two issues concern alleged errors on the part of the Trial Court in awarding any relief to Plaintiff. The last three

issues are directed at specific items of damage allowed.

Respondent will address all issues raised by Appellant. Before doing so, however, Respondent desires to point out some deficiencies in Appellant's first two points on appeal which would be the equivalent of a motion to dismiss, as a separate ground for disposing the issues discussed in those points.

Appellant's Point I alleges error on the part of the Trial Court in two particulars:

1) Appellant challenges Conclusion of Law number 2, entered by the Trial Court. (Note: Apprently there is no challenge to the remaining Conclusions.)

2) Appellant asserts that the Trial Court erred in failing to hold that Plaintiff was guilty of the first breach of contract.

These matters will be discussed in order.

1) As to Conclusion of Law Number 2.

Conclusion of Law Number 2 states:

"2. That the Plaintiff was reasonably led to believe that an adjustment would be made in the provisions of the said construction contract so as to eliminate the use of the split stockpile method in Plaintiff's production of Bituminous Surface Course Material." (R. 229.) (Emphasis added.)

APPELLANT'S POINT I IS ENTITLED IN PART:

"THE TRIAL COURT'S FINDING THAT PLAINTIFF WAS EXCUSED FROM HAVING TO COMPLY WITH THE SPLIT STOCKPILE METHOD IS ERRONEOUS AND CONTRARY TO LAW. . . ." (EMPHASIS ADDED.)

An examination of the remaining paragraphs of the Conclusions

of Law entered by the trial court discloses that a modification of the contract requirement was subsequently adopted which required Plaintiff to construct three stockpiles; (Conclusion No. 3, R. 229); that Plaintiff did in fact construct three stockpiles; (Conclusion No. 5, R. 230); that there was no requirement in the contract as to where the three stockpiles were to be located; (Conclusion No. 4, R. 229); and that Plaintiff was reasonably led to believe that it was in compliance with the requirements of the said construction contract as to the construction and location of the three stockpiles. (Conclusion No. 6, R. 230.)

Consequently, the trial court did not conclude, as asserted by Appellant, that Respondent was excused from complying with the split stockpile method, but rather the trial court concluded that Respondent was led to believe that it had adequately complied with the requirements of the contract concerning the split stockpile method of storing gravel. Appellant's assertions in Point I merely amount to an attempt to create a straw-man, which is easy to demolish, rather than to demonstrate any defect in the real action taken by the trial court.

Furthermore, the objections alleged by Appellant, (even if they were admitted to be valid) come under the heading of harmless error, which should be disregarded. (Rule 61, U.R.C.P.). Conclusions of Law numbers 7, 8 and 9, state in substance that

the Butuminous Surface Course asphalt produced by Plaintiff was in substantial compliance with the acceptance standards set out in the contract, (Conclusion No. 7, R. 230.); that Appellant was not reasonably justified in withholding payment therefor (Conclusion No. 7, R. 230.); that Appellant's obligation to pay for such acceptable asphalt was a material and essential part of the performance required of Appellant under the contract and was necessary at that time in order to require continued performance of Respondent, (Conclusion No. 8, R. 230.); and that Appellant breached the contract by its refusal to pay for the asphalt produced through September 26, 1975, which constituted an anticipatory breach of the contract on the part of Appellant, which terminated the contract and excused Respondent from further performance. (Conclusion No. 9, R. 230-231.)

Conclusion of Law number 2 is not a necessary foundation for the matters contained in Conclusions of Law numbers 7, 8 and 9, so that a reversal of paragraph 2 would not require a reversal of paragraphs 7, 8 and 9 to which Appellant has made no objection.

Consequently, it is submitted that Appellant's arguments on this issue are misleading and would not affect any substantial rights of the parties, or require a reversal of the Judgment.

2) As to Appellant's contention that Respondent was guilty of the "first breach".

An examination of the pleadings and the transcript of trial disclose that this point was not raised before the trial court but raised for the first time on appeal. This Court should refuse to consider issues and defenses raised for the first time on appeal. See, In re Estate of Ekker, 19 U.2d 414, 432 P.2d 45; Porcupine Reservoir Co. v. Lloyd W. Keller Corp., 15 U.2d 318, 392 P.2d 620.

Furthermore, if Appellant had intended to raise this point, it should have done so as an affirmative defense in its Answer. This was not done. Therefore, Appellant waived this defense. See Rule 12(h), U. R. C. P.

The same defect exists with respect to Appellant's contention in Point II of its Brief that, " . . . under the doctrine of election of remedies the actions of the joint venture partners after the alleged breach constituted an election to continue performance and Respondent has breached the revived contract." (Emphasis added.)

On the first day of the Trial, Appellant sought and was granted leave to amend its Answer and Counter-Claim. In its Amended Answer, Appellant alleged as a Third Affirmative Defense that " . . . Plaintiffs, by their actions, have waived the right

to assert that Defendant has breached the contract on the ground and for the reason that Pritchett Construction Company has continued performance under the contract . . ." (R. 69.)(Emphasis added.)

The issues relating to Pritchett Construction Co., were subsequently severed for trial at a subsequent date by stipulation of the parties on the record. (T-Dam. 10.) No Judgment has yet been entered as to the issues which relate to Pritchett Construction Co., and Pritchett Construction Co. is not a Respondent on this appeal, even though its name continues to appear in the title of this case.

However, Appellant never contended before the trial court or in its pleadings that the actions of Respondent, Industrial Construction, Inc., constituted an election of remedies or an election to continue performance, or that "Respondent has breached the revived contract" as Appellant now contends in Point II of of its Brief on Appeal. These are also defenses that should have been raised by affirmative defense in the pleadings, or they are waived according to Rule 12(h), U.R.C.P. Appellant should not now be allowed to raise these defenses for the first time on appeal. See, In re Estate of Ekker, supra; Porcupine Reservoir Co. v. Lloyd W. Keller Corp., supra.

For the foregoing reasons, it is respectfully submitted that Appellant's Points I and II of its Brief on appeal, and the relief requested therein (reversal of the Judgment and a new trial) should be dismissed.

POINT II

THE TRIAL COURT DID NOT ERR IN CONCLUSION OF LAW NUMBER TWO AND RESPONDENT DID NOT FIRST BREACH THE CONTRACT.

Respondent does not intend to try to prove (in opposition to Point I of Appellant's Brief) that the Trial Court was justified in holding that Respondent was excused from complying with the split stockpile method. As set out in Point I above, that was not the nature of the conclusion entered by the trial court.

The trial court did not say in this paragraph that the contract was modified so as to eliminate the split stockpile requirement. It only said that the Plaintiff was reasonably led to believe that the contract would be so modified.

There is ample support in the record for this conclusion. In paragraphs 7, 8 and 9 of the Findings of Fact, the court found in substance that prior to the bid opening, Mr. Lalif Wood had a telephone conversation with Mr. C. V. Anderson, the Utah State Highway Engineer. (R. 217.) In substance, Mr. Wood testified that he was told by Mr. Anderson that the split stock-

pile requirement of Sheet #56 would not apply to his hot plant operations if he were the successful bidder. (T. 38-41). It was upon this understanding that the Plaintiff submitted its bid. (T. 662.)

It is true that Mr. Anderson disputed Mr. Wood's testimony. (T. 416-421). However, the testimony of Mr. Wood is substantial evidence which supports the court's Findings and Conclusion, so that they should not be overturned on appeal. See, Wagstaff v. Remco, Inc., 540 P.2d 931.

The Appellant next contends, however, that Conclusion of Law No. 2 should nevertheless be reversed because it is presumed that all negotiations between parties who subsequently enter into a written contract are merged into the contract.

Here again, it should be noted that the trial court did not conclude that the contract was modified prior to the bid opening to conform to the telephone conversation, but it only concluded that Plaintiff was reasonably led to believe that the contract would be so modified.

In paragraph 3 of its Conclusions of Law, the trial court concluded that the construction contract was subsequently modified by mutual agreement of the parties whereby Plaintiff was to construct three stockpiles. (R. 229.)

This conclusion is also supported by the evidence in the form of a letter which was written on May 28, 1975, by the contractor at the request of the Project Engineer proposing the use of three stockpiles. This proposal was approved by letter from the Resident Engineer dated June 4, 1975. (Ex. P-3.)

This modification agreement being reduced to writing and entered into subsequent to the date of the original construction contract, is not subject to the merger doctrine announced in the case cited by Appellant.

It should also be noted that Appellant has never contended either at the trial or in its Brief on appeal that the letter of May 28, 1975, (Ex. P-2) did not constitute a valid modification of the construction contract.

On the contrary, the Appellant in its Brief on appeal states:

> "The real question, it is asserted, is rather what did Respondent's proposal as contained in the letter of May 28, 1975, (Ex. P-2) obligate Respondent to do and has Respondent breached that obligation?" (Appellant's Brief, p. 10. Emphasis added.)

Appellant next contends that the court was in error in finding that "neither the original specification nor the modification contained any requirement where the three stockpiles were to be located. (Finding of Fact No. 4.)" (Appellant's Brief, p. 11.) (Note: The reference should have been to

Conclusion of Law No. 4.)

This contention of the Appellant is astounding. Both the original specification (Ex. D-4 pp. 56 and 57) and the motification referred to (Ex. P-2) are in writing. A simple examination of those documents reveals that the Conclusion of Law referred to was correct, for neither document contains any reference whatsoever with respect to the location of the stockpiles. In fact, Appellant in its Brief on appeal, concedes that this is the fact. (Appellant's Brief, p. 11.)

Nevertheless, the Appellant argues that because the contractor did not locate the three stockpiles at the site of the hot plant, it committed the first breach of the contract, which in effect excused the subsequent breach on the part of the Appellant. At this point, it is appropriate and significant to point out that nowhere in its Brief on appeal does the Appellant contend that it did not breach the contract. It merely asserts that the Respondent breached the contract first.

In order to support this assertion, the Appellant relies on an amazing process of logic, rather than on solid evidence. After conceding that the "language of the special provision" or the Respondent's letter of May 28, 1975, does not require that the stockpiles be located at the hot plant site, Appellant states:

"While it is true that the exact language does not exist in either Exhibit, Appellant asserts that anyone of common intelligence would obviously assume that a competent contractor would locate the separate sized piles at the plant site." (Appellant's Brief, p. 12. Emphasis added.)

It takes a supremely self-confident lawyer (who is normally a layman as regards the contracting business) to make a statement like that. Yet Appellant fails to cite any other substantial basis in support of its contention that the contract requires the stockpiles to be located at the hot plant site.

Appellant cited the case of Wells Fargo Bank, N.A. vs. Midwest Realty & Finance Co. 544 P.2d 882 (Utah 1975), where this Court stated:

"Further, when a document is of that character [i.e., ambiguous or uncertain], the trial court can take extraneous evidence and look into the total circumstances to determine what the parties should reasonably be deemed to have understood thereby." (Emphasis added.)

Among the "total circumstances" which were introduced into evidence in this case as having a bearing on the understanding of the parties, were the following:

a. The contractor's letter of May 28, 1975, (Ex.P-2) states:

"Aggregate will be stored in three (3) stockpiles. The natural materials will be directed into one stockpile. The material being crushed will be split on the No. 4 screen

the plus 4 material will be put into a second pile and the minus 4 material will be put into a third pile. The material will be fed into the drier as required in order to meet the gradation specified." (Emphasis added.)

b. The contractor testified that he constructed the plus 4 and the minus 4 stockpiles in Pit #2, (at the crusher at the south end of the project), while the remaining pile was built in Pit #4. (At the north end of the project), which was also the location of the hot plant. (T. 65-66.)

c. The State personnel took tests of the material in these stockpiles to determine whether they would meet the requirements. (T. 67.) Therefore, they obviously knew the locations of the stockpiles.

d. The State personnel rendered written reports of the content of each pile to the contractor (T. 67-70.) These reports were introduced into evidence as Ex.P-4 and the location of each pile is noted on the corresponding report.

e. Both Sheet 56 of Ex. D-4 and the contractor's letter of May 28, 1975, (Ex. P-2) state that the contractor will have sufficient material in the stockpiles for two day's operations before commencing his hot plant operations. W. J. Stephenson, the State Materials Engineer, testified that according to the Specifications, it is the responsibility of the Project Engineer to determine whether the contractor has two day's material in the stockpiles before the hot plant operations are commenced. (T.327.)

f. The evidence was uncontroverted that prior to commencing its hot plant operations on September 18, 1975, the contractor notified the Project Engineer of its intention to start up and requested the State to have its personnel there to run the acceptance tests required by the contract. (T. 103-108.) No one testified as to any objection on the part of the Project Engineer to the start-up notice on the

basis that the contractor did not have the required stockpiles at the hot plant site, or on any other basis.

Based upon this state of the evidence, the trial court was clearly justified in determining that from the total circumstances the parties should reasonably be deemed to have understood that the contractor was not required by the contract to have its stockpiles physically located at the hot plant site.

This was also supported by Conclusion of Law No. 5, which states that the two stockpiles which were not at the hot plant site "were a small distance from the hot plant but were available for blending purposes if the contractor found their use to be necessary." (R. 230.)

Taken together, these Conclusions of Law, (which are amply supported by the evidence) demonstrate a coherent, reasonable interpretation of the intention of the parties.

Appellant also attempts to assert that the asphalt material produced by Respondent did not meet with the specifications. Yet the evidence is uncontroverted that between September 18, 1975 and September 26, 1975, the contracor produced asphalt having a value at contract prices of $29,712.90 against which the State was allowed to deduct $977.33 for material which did not totally comply with the Specifications. Furthermore,

the State's Materials Engineer, testified that so long as the contractor's product did not fall below the 70% pay factor the contractor was producing acceptable material according to the contract. (T. 348.) The lowest pay factor on any day for material produced by Respondent was 90%. (Ex. P-12.)

Appellant also argues that Respondent first breached the agreement by refusing to comply with directions of the Project Engineer. As noted above, this defense was raised for the first time on appeal.

The basis for this assertion is a letter which the Project Engineer wrote the contractor on September 23, 1975 (five days after the contractor had started up its hot plant operations). This letter was introduced into evidence as Ex. P-5. In it the Project Engineer acknowledged that the contractor had indeed constructed three stockpiles as proposed by the letter of May 28, 1975, and that the asphalt material being produced was in substantial compliance with the gradation requirements of the contract. However, the Project Engineer also stated that two of the stockpiles were "unavailable for use at the hot mix plant." He then concluded:

> "To comply with sub-sections numbers 403.03 and 407.03, you are directed to supply two or more stockpiles at the plant site" (Ex. P-5.)

Appellant's Brief states as follows:

> "Appellant's letter of September 23, 1975, (Ex. P-5) and Respondent's continued refusal to comply with the Engineer's direction to provide at least two stockpiles at the hot plant site, (R. 673) constituted a breach of contract." (Emphasis added.) (See Appellant's Brief, p.16.)

However, contrary to Appellant's assertion, no witness testified nor was any evidence introduced to the effect that the contractor refused (not to mention "continued refusal") to comply with the Engineer's direction.

Mr. Wood testified that after he received the letter in question (Ex. P-5) he had a conversation with the Resident Engineer in which he told the Resident Engineer in substance that material from the other stockpiles was available within 20 minutes that he didn't need the material from the other stockpiles; and that he told the Engineer that if he would give the contractor a letter directing it to move the stockpiles and agreeing to pay for the material if the contractor did not use it, it would be moved. (T. 115.) No one testified that there was any further action taken on this subject. It is respectfully submitted that the foregoing does not constitute a refusal to follow the order of the Engineer. Furthermore, the contractor is not bound to accept the Engineer's unilaterial interpretation of the contract. The contractor is bound only to follow the lawful orders

of the Engineer.

The most that could be said for Ex. P-5 is that it expresses the view of the Project Engineer that the Special Provisions required all stockpiles to be located at the hot plant site, although the provisions themselves are silent on the matter. (See Ex. D-4, pp. 56-57.) However, even the State's own witnesses testified that the contractor's letter of May 28, 1975, (Ex.P-2) had modified the Special Provisions (T. 361.) See also Ex. D-11, which is an inter-office memo from W. J. Stephenson (the State Materials Engineer) to the Project Engineer in which he states in part: "Any further interpretations or modifications of the Specifications, as seems to be included in your letter of 9/23/75, should not be considered." (Emphasis added.)

In view of the total evidence, the trial court was justified in concluding that the contract documents did not contain any requirement as to where the three stockpiles were to be located; that the Plaintiff did construct the three stockpiles required, all of which were available for use if necessary; and that the contractor was reasonably led to believe that it was in compliance with the requirements of the construction contract as to the construction and location of the stockpiles, in that the location of the three stockpiles was at all times known to the

Defendant, and on September 18, 1975, the Plaintiff was allowed by the Defendant to start up it hot plant and commence its paving operations without any objection from the Defendant. (See Conclusions of Law Nos. 4, 5 and 6. R. 229-230.)

POINT III

THE RESPONDENT WAS NOT GUILTY OF THE FIRST BREACH OF THE CONTRACT AND DID NOT ELECT TO CONTINUE PERFORMANCE AFTER THE BREACH OF CONTRACT BY APPELLANT.

Respondent has covered in Point II the assertion of Appellant to the effect that the contractor allegedly breached the contract first. Suffice it here to say that there is no basis in the evidence for such assertion, and the Appellant raised this argument for the first time on appeal.

The Appellant has also asserted that " . . . the actions of both of the Respondent joint venture partners subsequent to the breach determined by the trial court constitute an election to proceed with performance of the contract . . . ." (Appellant's Brief, p. 18. Emphasis added.)

This assertion is also disputed by Respondent. In support of this assertion, Appellant has cited cases to the effect that forfeitures are not favored in the law. Respondent submits that such cases are not appropriate, since this case does not involve a forfeiture, but rather deals with breach of contract.

Appellant cited several cases which supposedly support its position that " . . . work done after a breach is to be paid for at contract prices and binds him to perform." (Appellant's Brief, p. 22.)

However, Appellant has carefully avoided any discussion of the real test of an election to continue under the contract, i.e., did the contractor intend to continue under the contract? All the cases cited by Appellant in support of its position held that in those cases the contractor intended to maintain the contract in force after breach by the other party.

The same is not true in the instant case. Here the court found that Repondent performed work after the date of the breach because of unsafe conditions on Highway 91. " . . . and solely in the interest of protecting the motoring public from undue risks in transversing the construction project. . . . " (Finding of Fact No. 24, R. 222.) This finding is supported by substantial evidence in the record.

Mr. Wood testified that after the breach on the part of the State which caused the contractor to suspend its operations, he contacted C. V. Anderson, the State Highway Engineer, and told him that the existing road (Highway 91) through the project, constituted a hazard which should not be left through the winter

and that something had to be done. (T.130.) Mr. Wood also described the hazard which had been created by the construction of the freeway embankments on each side of Highway 91, and the placing of drains to direct water into the median (which was where Highway 91 was located at that time), and testified that, in his opinion, in freezing weather any cars coming down the road in the canyon would have no other place to go than just to run into each other. (T. 169-171.) He also stated that in order to remedy this hazard, he went to work so that the traffic could be switched from Highway 91 in that area onto the north bound lane. (T.169.)

He also testified that he had previously met with Blaine Kay, (the Director of Highways for the State of Utah), and told him, "if someone had an accident in that area, both ourselves and the State would have a pretty hard time coming up with a reason for leaving it in that condition." (T. 172.) Mr. Kay responded that he would contact the District Office and get back in touch with the contractor, but he failed to do so. (T. 173.)

Finally, before doing the work in question, the contractor, on October 22, 1975, delivered to the State the following letter:

> "This will acknowledge the letter which you hand delivered to our office on October 21, 1975. In view of the extensive efforts which we have made to finish the north bound lane to the point where traffic can be turned on to it, and in view of the constant resistance and interference which we have received

from the Department, which have frustrated all of our efforts to date, beginning with your letter of September 25, 1975, we do not appreciate your opening statement which attempts to inpugn our intentions in this regard.

"Furthermore, we do not intend to undertake the 'corrections' which you outlined in your letter, as we consider that our contract with the state has been terminated due to the breach of contract on the part of the state.

"However, solely in the interest of the safety of the public, we do intend to do such work as is required to put the traffic onto the north bound lane, and we are firm in our position that we are entitled to be paid for that work on the basis of force account.

"We invite your cooperation in getting this work done. In view of the private assurances which we have received from you and from others, we do not expect any interference from the state, since we feel that this is emergency work, being done under emergency conditions." (Ex.P-9.)

In response to the foregoing evidence the Appellant proferred testimony to the effect that it had made two contingency plans to handle the traffic either by using Highway 91, or by using the State maintenance forces to complete the necessary paving to turn the traffic onto the north bound lane. (T. 700.) However, it became clear that these plans had not be communicated to the contract and the Court sustained an objection to the proffer. (T. 701.)

Since the crucial question is to determine whether the contractor intended to proceed under the contract, it is respectfully

submitted that the State's proffer of proof was properly rejected. Since the State's plans were never made known to the contractor, they could hardly be probative of the contractor's intentions in doing the work performed after operations were shut down.

The evidence as to the work done by Pritchett Construction Company was admitted on a proffer of proof by Pritchett's attorney, which the State's attorney admitted by stipulation. (T.135-1 That proffer stated that after Industrial Construction discontinu work there were two items which Pritchett felt it was important t complete to protect the public and preserve the job from substantial damage. The first item was to complete a culvert which was necessary to handle the spring run-off. This matter was discussed with the project engineer, who desired to have that work done, and who stated that something would have to be done if the culvert were not completed. That work was done at a cost to Pritchett Construction of approximately $5,000.00 in labor and another $5,000.00 in materials. The second item was the installation of an expansion joint on a bridge which had been constructed. This joint was necessary to protect the bridge against winter weather and to keep ice out of it. This work required about one man-day. (T. 135-136.)

When measured against a total contract price of almost $7,000,000.00, these items would not appear to indicate any intention of waiving the breach and resuming operations.

In its brief, Appellant asserts that " . . . plans had been made [by the State] which alleviated the need for the work to be done as alleged by Pritchett." (Appellant's brief, p. 24.) However, the same witness for the State testified that he didn't know of anyone who knew of these plans, except for himself and the Project Engineer. (T. 682.) He also testified that in his opinion it was necessary to do something to let the water drain away from the grade (road embankment) in order to save the grade. (T. 683.)

The evidence before the court amply supports the Findings of Fact entered by the trial court, which this court should sustain.

POINT IV

THE TRIAL COURT DID NOT ERR IN ITS AWARD OF ANTICIPATED PROFITS.

The trial court found that the State of Utah breached the construction contract and that such breach was a material breach of its duties under the contract, which constituted an anticipatory breach by Defendant. The trial court awarded Plaintiff $340,025.18, as the amount of profit anticipated to be earned on the portion of the contract remaining to be performed as of

the date of the breach by Appellant.

Apparently, Appellant does not appeal from the findings of the court that its breach constituted an anticipatory breach (since that issue was not raised on appeal), but claims only that the amount awarded is excessive.

Admittedly, since we are dealing with profits which the contractor anticipated would be earned over the future performance, and since the contract was not performed due to the breach and termination thereof by the State, the figures are not as susceptible of definite proof as they would be, had the contract been performed. However, it is a well recognized rule of law that the difficulty involved in exact determination of damages for lost profits does not preclude their recovery. In establishing loss of future profits it is only the fact that some loss has resulted from Appellant's breach which must be proved with certainty. The amount of lost profits may be estimated from all the evidence admitted. See, Howarth v. Ostergard, 20 U.2d 183, 515 P.2d 442; Gardner v. The Calvert, 253 F.2d 395; Smith v. Onyx Oil & Chemical Co., 218 F.2d 104.

The cases do not lay down a single formula by which anticipated profits must be calculated, and various methods have been approved. Thus, in Pat J. Murphy, Inc. v. Drummond Dolomite, Inc.,

232 F.Supp. 509, the court computed anticipated profits by finding the average percentage of the contractor's net income compared to its gross income for the previous five years, and applied that percentage figure to the costs the contractor incurred on the contract in question.

In Frank Horton & Co. v. Cook Electric Co., 356 F.2d 485, the court awarded anticipated profits to the contractor in the amount of $175,917.84. The appeals court stated:

> "In arrving at this figure, the court considered a rough cost estimate prepared by Horton in November, 1960, a more detailed estimate also prepared by Horton in January, 1963, and Horton's own testimony. Cook argues that the detailed estimates should not have been admitted as the summaries of an expert because the estimates were self-serving and because Horton did not sufficiently explain the manner in which the work would have been performed. The court, however, expressly recognized the self-serving nature of the cost estimates. It adjusted the estimates upwards in many instances, and chose to credit Horton's calculations in other instances . . . . We think that the district judge properly admitted Horton's cost memoranda. Horton's calculations provided the best method of proving lost profit which could have been adopted. (Id. 356 F.2d at 492.) (Emphasis added.)

The computation in the instant case is somewhat similar to that presented in the Horton case, supra. Mrs. Hitchcock, the office manager of Industrial Construction, Inc., testified that she participated in the preparation of the bid on the contract in issue. (T.-Dam. 143.) She testified as to the elements

which were estimated at that time as anticipated cost and anticipated profit of the contract items in preparing the contractor's bid, (T.-Dam. 17-20.) and stated 30% was about normal for gross profit. (T.-Dam. 149-150.) Mrs. Hitchcock also adjusted this gross profit to arrive at net profits. (T.-Dam. 146-147.)

She also identified and there was introduced into evidence as Exhibit P-41, a computation of anticipated profits on the work remaining to be done as of the date of Appellant's breach of the contract. In some cases the profits originally anticipated were adjusted downward on Exhibit P-41 because of the contractor's experience to the date of the breach. (T.-Dam.107-109.)

The State did not introduce any expert witness who could testify as to anticipated costs and profits. However, Robert Rowley, a witness called by the State, testified that the Special Conditions applicable to this construction contract allowed the contractor a profit equal to 30% of the cost of labor for all work done on force account (cost plus). (T.-Dam. 192-193.)

It should be noted that the State has not challenged the sufficiency of this evidence, but claims only that the figures show that there would not be enough money left in the unpaid amount of the total contract price (after deducting anticipated costs) to justify this award. (Appellant's brief, p. 25.)

The State has included in its brief a complicated and hard-to-follow computation, which it claims justifies its position. Respondent asserts that the computation is in error in several particulars.

In the first place, the figures used by the State do not coincide with the figures as found by the Court . (Cf., Finding of Fact No. 25, R. 222-223.)

In the second place, on the bottom half of page 30 of Appellant's brief the figure of $166,876.38 has been deducted from the balance available to pay profits. These figures are a total of four items representing overpayments to the contractor for work already performed prior to the date of the breach. While the court found that credit should be allowed the State for these items, they actually represent a reduction of the amount paid on the contract prior to September 25, 1975, and therefore, a corresponding increase in the amount remaining available to be paid for work done after that date. The doubling effect of deducting rather than adding this sum to the balance available creates an error in the amount of $333,742.76, which is almost enough by itself to account for the full amount of anticipated profit allowed by the Court. When added to the $90,301.35 which Appellant admitted as still remaining, (Appellant's brief, p.32),

it becomes apparent that there is approximately $425,000.00 available to pay the anticipated profit awarded by the court in the amount of $340,025.18.

Based upon the evidence presented, the trial court found that the contractor had anticipated a gross profit of 30% on this contract. The court then reduced this to 20% to arrive at net profit. (R. 228.) It is apparent from the evidence that the amount awarded was substantailly less than the amount which would have been justified by the testimony of either the witness for the State (Mr. Rowley) or the witness for the contractor, (Mrs. Hitchcock). This would appear to be within the guidelines and the sound discretion of the trial judge as laid down by this court in the case of Even Odds, Inc., v. Nielson, 22 U.2d 49, 448 P.2d 709 as follows:

> "Speaking generally about damages, the desired objective is to evaluate any loss suffered by the most direct, practical and accurate method that can be employed.
>
> * * * * *
>
> "We have no disagreement with the proposition that the fact-trier should not be permitted to arbitrarily ignore competent, credible and uncontroverted evidence. Nevertheless, he is not bound to slavishly follow the evidence and figures given by any particular witness. Within the limits of reason it is his perogative to place his own appraisal upon the evidence which impresses him as credible and to draw conclusions therefrom in accordance with his own best judgment."

For the foregoing reasons, the award of anticipated profits should be either sustained or adjusted upwards.

POINT V

THE AWARD OF GENERAL DAMAGES IS PROPER AND SHOULD BE SUSTAINED.

In its brief, Appellant states that is "is not contesting the right of a court to award general damages, assuming the fact of a breach of contract." Appellant limits its attack to an assertion that the award is not supportable by substantial evidence in the record.

The court awarded general damages in the sum of $100,000.00, (the sum prayed for in Plaintiff's Complaint) based upon a finding that the Plaintiff had suffered this damage as the probable and necessary result of the intentional acts constituting the anticipatory breach by Defendant. The court found that Plaintiff was damaged in that Plaintiff was unable to bid and bond other work while this matter was unresolved; that the breach of Defendant also damaged Plaintiff's credit reputation by interrupting Plaintiff's cash flow; that Plaintiff's earning capacity was damaged; and that by reason of Defendant's acts, Plaintiff had been subjected to suits from other creditors on this contract, which resulted in additional counsel fees (in those other cases) and other normal damages. (See Finding of Fact No.32(d), R.227.)

This finding was based upon the testimony of Mrs. Hitchcock, office manager of the contractor.

As noted above in Point IV, after the fact of loss is established, the court can estimate the amount of damage " . . . from the facts in evidence, including the inferences to be drawn from them, and the probabilities which they suggest." Gardner v. The Calvert, 253 F.2d 395, 399. (Emphasis added.)

Among the facts in evidence pertinent to this issue are the following:

1. The Plaintiff had the contracting capacity to bid and bond this contract, amounting to almost $7,000,000. Part of this was to be performed by sub-contractors to whom Plaintiff was liable.

2. At the same time the contractor was also performing another contract for the State of Utah. (T.-Dam.173.)

3. Construction commenced on this contract August 24, 1974, (T.-Dam.35); the breach occurred September, 1975, (or a total time in progress of 13 months), during which time the contractor had received $3,715,324 for work performe

Among the inferences which could be drawn from this evidence are the following:

1. The contractor's average monthly cash flow from this project alone was $285,795.00

2. The fact that the State improperly terminated the construction contract with the contractor does not excuse the contractor on the sub-contracts and equipment rental agreements it had entered into in reliance upon his contract with the State.

3. Yet the State's breach and termination of the contract deprived the contractor of the cash flow needed to pay its sub-contractors and suppliers, and subjected the contractor to suits from them.

4. The fact that the State refused to recognize its breach and make appropriate relief available to the contractor, but, on the contrary, insisted that the contract was still in force, tied up at least $7,000,000 of Plaintiff's bonding capacity until this dispute was resolved, a period of 16 months (not counting time on appeal.) Against this figure alone the award of $100,000.00 represents a recovery rate to Plaintiff of only about 1% per annum.

All of these types of damage are normal and necessary consequences of the breach of this contract, and as such could have been foreseen at the time the contract was entered into. Consequently, these items are compensable within the rule of reasonable foreseeability. See, Pacific Coast Title Ins. Co. v. Hartford Accident and Indemnity Co., 7 U.2d 377, 325 P.2d 906, 907.

It is most probable, in view of the amounts involved, that the trial court would have awarded damages in a greater amount, but limited the recovery to $100,000 because that was all that was prayed for in Plaintiff's Complaint.

From the foregoing, it would appear that the award was supported by substantial evidence, and should be sustained.

POINT VI

THE EVIDENCE SUPPORTS THE COURT'S ALLOWANCE OF VARIOUS OTHER ITEMS OF DAMAGE AND THE REJECTION OF CLAIMED OFF-SETS.

Under Point V of its brief, Appellant challenges five items of damage awarded to Respondent by the trial court, claiming there was no evidence to support these awards. Appellant also complains that the court failed to grant a greater off-set than was allowed for one item referred to as "finishing the sub-grade."

These challenges go only to the question of whether the evidence supports the court's awards. Respondent asserts the evidence submitted supports the court's decision.

(1) Unrecovered cost of water.

Mrs. Hitchcock, the office manager of Respondent, testified that as of the time the contract terminated due to the breach of Appellant, the contractor had not recovered the sum of $19,573.21, constituting the unpaid balance of a total cost of $77,372.04. Exhibit P-52 was introduced into evidence showing the computation of this item.

Appellant's attack on this item is based upon Appellant's view that the cost of water must be included under an item entitled, "Mobilization", which is an item in the contract, (the amount of which is determined by the contractor on a bid basis) to compensate the contractor for setting up costs incurred in preparation of its performance under the contract.

Appellant quotes an extract from Section 601.01 of the

Standard Specifications (Ex. D-2 p. 269) which defines "Mobilization". However, although Appellant has underlined the last four lines, it has ignored the effect of the words " . . . not otherwise paid for . . . ."

Section 207 of the same specifications (Ex. D-2,pp.82,83) is a section entitled "Watering", and provides that water shall be paid for at the unit contract price per 1,000 gallons, showing that payment for water is not normally included under the heading of "Mobilization".

Mrs. Hitchcock testified that the Special Provisions for this contract required that the cost of water has to be included in other items of work (T.-Dam.34.) She testified that the contractor had allocated the cost of water to the items of the contract that required the use of water. (T.-Dam. 37). This testimony was further corroborated by her testimony as to anticipated profits,in that she testified that the allocated cost of water was charged as an expense to the various items where water was used in computing the amount of profit anticipated. (See T.-Dam. 104, 127.)

Respondent submits that the foregoing constitutes substantial evidence and amply supports the Court's decision.

(2) SALARIES TO KEY PERSONNEL
(4) EQUIPMENT REANTAL PAID TO OTHERS

These points will be covered in Respondent's Cross-Appeal, under Point VII, which is incorporated herein in opposition to Appellant's arguments.

(5) BITUMINOUS PAVING DONE AFTER BREACH

Appellant argues only that recovery for this item should be the contract price or the reasonable value of the work, rather than the basis used by the Court.

It is respectfully submitted that in view of the court's findings, that the contract was terminated on September 26, 1975, due to Appellant's breach (from which finding there has been no appeal) it would be totally inconsistent for the court to base its award on prices found in this contract.

Furthermore, since the court found that the contractor performed the work ". . . to turn the traffic from that portion of Highway 91 which constituted a danger to the motoring public" (R.227.), how could any standard of proof be devised to show the reasonable value of the benefit conferred upon the public by reason of averting that danger?

On the other hand, the State's own witness testified that the State had formulated plans which included doing the same work as performed by the contractor, but using the State's own maintenance forces. (T. 700.) Since the State failed to offer any

evidence as to its anticipated cost of doing the work with its own forces the trial court could justifiably reason that the costs incurred by the contractor plus a reasonable allowance for profit would be cheaper than the costs incurred by the State to do the same work. (Otherwise, it would appear that the State could save money by doing all road construction work with its own forces rather than contracting out the work as is its normal practice.)

Under this assumption the amount awarded would be less than the reasonable value of the work (measured by the costs saved by the State) and the award should be affirmed.

(3) RESTORATION OF PRICE REDUCTION

The Court found that on the fourth day of asphalt production the State forces made an error in the test results, and the court restored to the contractor a price reduction of $1,822.37 which the State had unilaterally attempted to assess.

The State "finds this to be one of the most distasteful acts of the trial court." (Appellant's brief pp.43-44.) This is "distasteful" because it is difficult for the State to admit it commits errors. Yet that is precisely what Mr. Weldon Heaton, (the State employee responsible for the error) admitted on the stand. (T. 528.)

Mr. Wood testified that as a result of the information he

received from this erroneous test result, he ordered adjustments to be made in the hot plant, and that before the error in the test information was discovered the hot plant had been readjusted. (T.

Furthermore, Ex. P-16, which is a letter from the Project Engineer on the same subject admits that changes had been made in the hot plant. (See Ex. P-16, second page, 1st paragraph.)

It is respectfully submitted that the restoration of this attempted price reduction is amply supported by substantial evidence

(6) OFFSET CLAIMED BY THE STATE BUT NOT ALLOWED BY THE COU

The Appellant claimed that it was entitled to a reduction or offset against amounts previously paid the contractor under the item "Roadway Excavation" because some of the embankment had not been "finished" (i.e., graded to a smooth furface) at the date of the breach. The contractor conceded that an offset in the amount $11,055 would be proper. This figure was based upon the opinion Mr. Wood, President of Respondent, of the cost of the finishing work Plaintiff was not required to perform. (T.-Dam. 542-552.)

The law is clear that the basis for determining the amount of the offset was the contractor's cost of the work it was not required to do. See, Hammaker v. Schleigh, 157 Md.652, 147 Atl.790.

In support of its claimed offset, the State produced Robert Rowley, a Project Engineer on a different job, which Respondent

was also performing for the State of Utah (T.-Dam. 173.) Mr. Rowley produced a summary of men and equipment purportedly used by the same contractor in its operations to finish grade the embankment constructed on the other project. (See Ex. D-62.)

However, Mr. Rowley admitted that this summary was not a fair estimate of the contractor's cost to complete this item. (T.-Dam. 194-195.) In fact, Mr. Rowley testified that his summary was intended to show what that operation would cost the State if the work were done on force account or cost plus. (T.-Dam. 193.) For that purpose Mr. Rowley had computed equipment costs based upon an hourly rental rate, which he said also includes profit and other factors (T.-Dam. 187.) Also, he admitted that his labor figures included not only the cost payable by the contractor, but an additional 30% for profit, which was allowed by the State in its force account formula. (T.-Dam. 188.)

In view of these admissions, it would appear that Mr. Rowley's testimony and his summary (upon which Appellant's claimed offset is based) simply has no bearing on the real issue. Appellant, in effect, concedes this when it states in its brief on appeal, (in arguing a different point):

> "As the Court knows, a force account arrangement is only resorted to when a price for work cannot otherwise be arrived at. It is artificial and bears little relation

to reality so far as costs of an overall contract (sic.)." (Appellant's brief, p. 33, Emphasis added.)

In view of Mr. Rowley's admission that his evidence was not designed to disclose the cost saving to the contractor of not having to perform the finishing work, the court was justified in rejecting it, and probably would have committed reversable error if it had made any awarded based on Mr. Rowley's evidence.

POINT VII

THE COURT COMMITTED ERROR IN FAILING TO AWARD RESPONDENT THE SUM OF $446,531.42 FOR THE EXPENSE OF EQUIPMENT RENTED FROM OTHERS.

At the time the State breached the construction contract, the contractor shut down its operations. Thereafter, the contractor released its construction crews, and turned back non-essential equipment rented from others. However, the State asserted that it had not breached the contract and that the contractor was required to complete the construction work. (See, Appellant's Answer and Counter-Claim and Amendment thereto, R. 39, 69.)

Therefore, the contractor retained its key personnel and certain of the rental equipment which it could not replace (T.-Dec. 28), until the end of April, 1976, when the court ruled in favor of Respondent on this issue.

During this interval of seven months, while the responsibil-

of the contractor to do the work remained in doubt, the contractor incurred out-of-pocket expense in salaries for its key personnel in the amount of $39,773.48, and paid out $446,531.42 in rental payments to others on the essential equipment it had retained.

The trial court awarded Respondent damages for the full amount of the salaries paid to its key personnel for the entire period. However, the court awarded only the sum of $191,370.00 for equipment rental payments, which the court stated approximated three month's rental, instead of the seven month's rental claimed by Respondent.

The court based its award on certain testimony of Mr. Wood, to the effect that the equipment retained would have been needed for approximately three months had the breach not occurred.

This award is inconsistent for if, as the Court determined, it was reasonable for the contractor to retain its key employees on the payroll for seven months while the status of the contract was in doubt, it should also be prima facie reasonable for the contractor to retain necessary equipment rented from others for the same period.

The determination of this matter relates to the foreseeability

of potential harm in each case by releasing the contractor's key employees on the one hand or its rented equipment on the other. Since both were necessary to complete the contract in the event the court had found the contract to be in force rather than terminated, the contractor was equally justified in retaining both its key employees and its necessary rented equipment.

The case of Blair v. US for the Use of Gregory-Hogan, 147 F.2d 840, cited by Appellant, recognizes the propriety of awarding damages upon a breach of contract for rental payment incurred on equipment rented from others. In fact, that case supports Respondent's claims rather than Appellant's.

In a part not quoted by Appellant, the Blair case, supra, also recognizes that there are limits to the duty of the contractor (upon repudiation of the contract by the other party) to minimize his damages, especially where he must stand in readiness to perform. (See, Id., 147 F.2d at 849.)

The Restatement of Contracts §336 (1) also recognizes in effect, that a party not in breach is not required to incur undue risk in order to avoid harm to itself arising out of the breach.

Comment (a) on that subsection provides as follows:

> "After the Plaintiff has reason to know that a breach has occurred . . . he is expected to take such steps to avoid harm as a prudent person would take. He

cannot get damages for harm that could thus be avoided. . . . In general, however, it is reasonable for the Plaintiff to rely upon the Defendant to perform as he has promised. . . . It is not reasonable to expect the Plaintiff to avoid harm if at the time for action it appears that the attempt may cause other serious harm." (Emphasis added.)

Thus, it appears that at the time of the breach the Plaintiff is not required to release its key personnel and all of its rented equipment, so long as it is reasonable to believe that it is possible Plaintiff may later be required to perform the balance of the contract.

In its brief, Appellant ". . . concedes that a rental expense incurred for machinery owned by others may be recoverable by Respondent." (Appellant's brief, p. 42.) However, the Appellant asserts that the rental agreements in this case were "purchase contracts in disguise". This is not supported by the evidence. Some of the rental agreements contained options to purchase the equipment. However, the evidence was uncontroverted that the Plaintiff had not exercised the options and didn't intend to. (T.-Dam. 132-133.)

Appellant also contends that the "cut-off date" for the allowance of equipment rentals and salaries to key personnel should have been October 22, 1975, the date of Ex.P-9 in which

the contractor states "we consider our contract with the State has been terminated." (However, the State overlooked this same letter in connection with its argument under Point II that the contractor had elected to resume work under the contract.)

The contention of Appellant would have merit if on October 22, 1975, Appellant had recognized its own breach of contract. However, it did not do so, and the only reason the contractor retained this rented equipment past the date of the breach was that until the court ruled otherwise, the State continued to insist that the contractor was bound to finish the work.

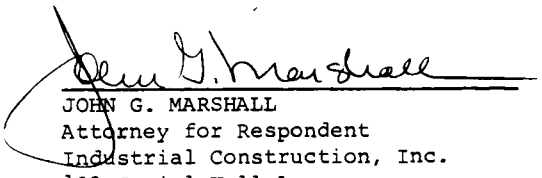
The State should not now be permitted to profit by its own intransigence by asserting that the contractor was bound at its peril to release its key personnel and essential rental equipment the moment the contractor asserted (which the State disputed) that the contract was terminated.

Based on the same factors, no reason appears why the court should have awarded rental expenses incurred for only three months instead of the full period of seven months during which the issue remained in doubt.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Judgment of the trial court should be sustained, except that the Judgment should be modified to allow Respondent damages for the sum of $446,531.42 as rental expenses incurred on equipment rented from others, rather than the lesser sum awarded by the trial court.

Respectfully Submitted,



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